

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PIER FISH CO., INC.)
v.)
EMPIRE SEAFOOD, LLC)
Defendant.)

EMPIRE SEAFOOD, LLC)
Plaintiff in counterclaim,)
v.)
PIER FISH CO., INC.)
Defendant in counterclaim.)

EMPIRE SEAFOOD, LLC)
Third Party Plaintiff,)
v.)
RICHARD J. BARRY)
Third Party Defendant.)

THIRD PARTY COMPLAINT

Third Party Plaintiff Empire Seafood, LLC, as and for its Third Party Complaint against Richard J. Barry, hereby alleges as follows:

The Parties

1. Defendant/Plaintiff in Counterclaim/Third Party Empire Seafood, LLC (“Empire”) is a Delaware corporation having a principal place of business at 3595 NW 125th Street, Miami, Florida.

2. Third Party Defendant Richard J. Barry (“Barry”) is an adult individual. Upon information and belief, Barry resides at 10 Everett Street, South Dartmouth, MA 02748. Upon information and belief, Barry is the President and Treasurer of Pier Fish Co., Inc., as well as its Chief Executive Officer.

3. Plaintiff/Defendant in counterclaim Pier Fish Co., Inc. (“Pier Fish”) is a Massachusetts corporation with a principal place of business at 10 New Market Square, Boston, MA 02118.

4. On or about August 16, 2006, Pier Fish commenced this action against Empire by filing a complaint in Massachusetts Superior Court, Business Litigation Session, Suffolk County, Civil Action No. 06-3472-BLS, alleging breach of contract, breach of the covenant of good faith and fair dealing, and violation of M.G.L. c. 93A.

5. On or about September 22, 2006, Empire timely removed the underlying action to this Court based upon diversity of citizenship. This court may exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1337.

Facts

6. In or around 2006, Pier Fish placed two orders from Empire for the purchase of snow crab from Empire.

7. Pier Fish provided Empire with a Customer Information and Credit Application dated April 1, 2006 (the “Credit Application”).

8. The Credit Application set forth various terms and conditions between the parties.
9. Specifically, the Credit Application states as follows:

For and in consideration of the extension of credit to the Purchaser identified in the foregoing application, I, the undersigned, personally guarantee prompt payment of any and all indebtedness owing to Empire Seafood, Inc. by Purchaser.... I understand that this guarantee shall be an absolute and continuing guarantee for any and all indebtedness of Purchaser to Empire Seafood, Inc. its affiliates, successors or assigns.

* * *

In the event of any default by Purchaser or its obligation to Empire Seafood, Inc., Empire Seafood, Inc. may proceed directly against me to enforce its rights, without proceeding against Purchaser or exhausting any other remedies Empire Seafood, Inc. may have. This personal guarantee shall be binding upon myself, my heirs, successors, representatives and assigns, and shall insure to the benefit of Empire Seafood, Inc.

10. Barry signed the Credit Application, identifying himself as "Richard Barry" and providing his address and social security number.

11. A copy of the Credit Application was transmitted to Empire by Pier Fish (or its duly authorized agent) by facsimile.

12. On or about May 7, 2006, Empire delivered to Pier Fish one load of snow crabs, which Pier Fish accepted.

13. On or about August 2, 2006, Empire delivered to Pier Fish a second load of snow crabs, which Pier Fish accepted.

14. Empire invoiced Pier Fish for said deliveries of snow crabs.

15. Pier Fish accepted delivery but has not paid for two deliveries of goods from Empire in the amounts of approximately \$92,730.00 (No. 01-045670) and \$99,330.00 (No. 01-052003).

16. By way of letter dated September 6, 2006, an attorney representing Pier Fish sent a check (Check No. 73147) in the amount of \$182,987.20 to Empire.

17. By way of letter dated September 28, 2006, Empire informed Pier Fish that it would accept Check No. 73147 as a credit against Pier Fish's outstanding balance, but not in full satisfaction of any debt owed by Pier Fish to Empire.

Count I (Breach of Contract)

18. Empire specifically incorporates by reference and realleges the allegations contained in Paragraphs 1 though 17 above as if set forth fully herein.

19. Empire and Barry entered into an agreement whereby Barry agreed to guarantee any debt owed by Pier Fish to Empire.

20. Pier Fish is indebted to Empire in the amount of approximately \$9,072.80, plus interest and attorney's fees.

21. Barry breached his obligation to Empire by not tendering payment to Empire.

22. Empire has satisfied all conditions precedent with respect to its obligation to Barry.

23. Empire has been damaged by the conduct of Barry.

WHEREFORE, Empire hereby demands judgment against Pier Fish in an amount to be determined at trial, together with costs, attorney's fees and interest.

Jury Demand

Empire hereby demands a trial by jury on all claims raised.

Respectfully submitted,

EMPIRE SEAFOOD, LLC

By its attorneys,

/s/ Jeffrey S. Siegel
Diane Saunders (BBO# 562872)
Jeffrey S. Siegel (BBO# 647148)
MORGAN, BROWN & JOY, LLP
200 State Street
Boston, MA 02109-2605
(617) 523-6666

Dated: September 29, 2006

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), including counsel for Plaintiff, Andrew B. Saunders, Saunders & Saunders, LLP, 700 Pleasant Street, New Bedford, MA, and a paper copy has been sent by regular mail on 29th day of September, 2006.

/s/ Jeffrey S. Siegel